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No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1958

HOWARD R. MARSHALL, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 54-65) is reported at 258 F. 2d 94.

JURISDICTION

The judgment of the Court of Appeals was entered July 22, 1958. The petition for a writ of certiorari was filed on September 19, 1958, and the petition was granted on November 17, 1958 (R. 71). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The first question presented by the petition for a writ of certiorari, to which the grant of certiorari was limited (R. 71), reads as follows:

Whether a defendant in a criminal trial to a jury is denied a fair trial when members of the jury during the course of the trial read newspaper articles which state that the defendant has a record of two previous felony convictions and recite other defamatory matter.

STATEMENT

1. An information filed in the District Court for the District of Colorado alleged that on two occasions the petitioner unlawfully dispensed a number of dextroamphetamine sulfate tablets, a drug within the scope of 21 U.S.C. 353(b)(1)(B) (Pet. Br. 2), without a prescription from a licensed physician, which resulted in misbranding in violation of 21 U.S.C. 331(k) (Pet. Br. 2) (R. 2-3). The petitioner was found guilty on both counts and sentenced to imprisonment for six months (R. 4, 6-7). The Court of Appeals for the Tenth Circuit affirmed, one judge dissenting (R. 54-66).

At the trial, a government agent, Robert E. Keating, testified that he was introduced by a friend to the petitioner in the guise of a salesman (R. 8-9, 25-26). Some five days after the first introduction, Keating met petitioner for the second time (R. 9, 24). After some social conversation, Keating told the petitioner that he was about to undertake a lengthy trip by car, and was desirous of obtaining some "stay-awake" pills (R. 9-10, 24, 25-26). The petitioner suggested using No-Doz and coffee, but Keating replied that he had

tried this to no avail (R. 10, 24-25). Nothing further was said about the matter, but as Keating was leaving the petitioner's apartment he was called back and given a package by the petitioner which contained five tablets and two capsules (R. 10-11). The petitioner gave Keating directions to take the tablets during the trip and the capsules later if he felt nervous (R. 11). Later analysis showed that the tablets in the package were dextro-amphetamine sulfate tablets. At a later time, Keating said he would like about a hundred of the drugs to leave in the car since he was going on another trip (R. 14-16). Keating obtained 50 tablets of the drug and 24 capsules, this time paying the petitioner $15 (R. 15-16).

The petitioner asked the trial judge to hold that there was entrapment as a matter of law, but this request was refused (R. 34-35). The government asked to be allowed to prove that the petitioner had previously practiced medicine without a license, as tending to refute the defense of entrapment. This too was refused, the trial judge being of the opinion that since it would not be shown that the petitioner had dispensed drugs of the type here involved, the evidence would not be relevant for the government's purposes (R. 35-36).

2. The trial ran for three days. Inspector Keating testified on the first day. At the first recess, the judge cautioned the jury about outside influences (R. 16). The warning was repeated at the noon recess, and again before concluding the day's activities (R. 26, 27). On the morning of the second day, it was brought to the attention of the court that two newspaper articles had been published, since the end of the pre-

vious day's proceedings, which contained statements about petitioner.

The headlines on the articles were merely, in one paper, "Jury Selected to Try Man on Drug Charge"; and, in the other, "Trial Opens on Sale of Restricted Drugs" (R. 52-53). In the first paper, the *Rocky Mountain News*, the article, after four short paragraphs reciting the charges and what had thus far occurred at the trial, also reported that petitioner had two previous convictions for felony; that in 1953 petitioner had told an Oklahoma legislative committee that, although he had only a high school education, he practiced medicine with a diploma received through the mails; that petitioner told in detail of the ease with which he wrote and passed prescriptions for dangerous drugs (R. 52). The other paper, the *Denver Post*, after noting the start of the trial, reported that petitioner had once been identified before an Oklahoma legislature as one who acted as a physician and prescribed restricted drugs for a singer before his death; that petitioner's wife had been convicted on the drug charges; and that petitioner had once served a term for forgery (R. 52-53).

In a discussion between court and counsel as to the procedure to follow in these circumstances (R. 27-31), petitioner's counsel stated that he "would prefer the individual interrogation of the jurors by the Court in chambers" (R. 30). On inquiry, government counsel stated to the court that they had not supplied the adverse information, and so far as they knew no other government agent had done so (R. 27-28). Apparently, the reporters had seen an article in a national magazine mentioning petitioner, and also had some other non-federal source of information (R. 27-29).

Each of the jurors was called into chambers individually, with counsel present and participating in the questioning (R. 39ff.). Six of the jurors had not seen either of the articles and did not know the contents (R. 39-40, 41, 43-44, 44-45, 47-48, 49-50). Two of the remaining six said they had only scanned the articles and could not recall the contents (R. 42-43, 45-46). Three of the others had read the article in the *Rocky Mountain News* (R. 40-41, 48-49, 50-51), and one had read both articles (R. 47). Each juror said that he would not be influenced by the newspaper articles, could decide the case only on the evidence in the courtroom, and felt no prejudice against petitioner as the result of the articles (R. 40-41, 47, 48-49, 50-51). In the interview with one of those who had read the article in the *News*, the following occurred (R. 41):

> Mr. Francis [Petitioner's attorney]: I wonder if I might inquire, were you in anyway affected so far as your feelings toward Mr. Marshall were concerned, by the article?
>
> Mr. Gomer [Juror]: No, sir, hardly.
>
> Mr. Hardey [Government counsel]: You recognize, of course, that newspaper articles are frequently untrue and not verified and do not necessarily reflect true facts?
>
> Mr. Gomer: Yes, sir.
>
> Mr. Hardey: It might well be the situation here, might it?
>
> Mr. Gomer: Yes, sir.

Another juror who had read the *News* article was asked by the court (R. 48-49):

> The Court: You could lay that out of your mind entirely and decide the case on the evidence you hear from the witness stand?

Mrs. Bottinelli [Juror]: The evidence I've got to understand is whether he sold the medicine, so that would have nothing to do from this.

The Court: You would decide that from the evidence in the courtroom?

Mrs. Bottinelli: Yes, and not the rest.

As to another of this group, the following occurred in response to questions by petitioner's counsel (R. 51):

Mr. Francis: I know you want to be absolutely fair in this case and it is for that reason that we are inquiring this morning. If your feelings would in any way be influenced, however slight, by what you read or what you have read and if your feelings would in any way be influenced against the defendant, we would appreciate knowing it.

Mrs. Downer [Juror]: No, I don't feel that it would make any difference at all, that is what I said.

Mr. Francis: Yes, Ma'am, I know that, but do you feel if you were in Mr. Marshall's chair that the article as read by the jury would still not be unfair to Mr. Marshall?

Mrs. Downer: What do you mean?

Mr. Francis: Well, do you think in your own mind that having read what you did read that you can look at the case fairly?

Mrs. Downer: Well, I feel that we are supposed to just accept what we hear from the witness stand, not anything that is in the paper. There is a lot of things I read in the paper that I don't believe.

The petitioner's motion for mistrial was thereupon denied (R. 31). The judge stated, *inter alia* (R. 31):

* * * I am satisfied with the interrogation of the jurors—there were only about four of them had

read the article in the newspaper—all of them satisfied me they would not be influenced in any way about the item, could proceed and render a fair and impartial verdict from the evidence and the law in the case.

I think the signs [*sic*] of the jurors was very apparent from their answers and their demeanor while they were here, and I feel very confident in my own mind that the matter having been called to their attention, that they will lean over backwards, as a matter of fact, in consideration of the case to stay away from any extraneous matter they may have read or heard or anything else.

* * * * * *

I think the jury was not prejudiced in any way or impressed, as a matter of fact, by the article. I feel that there will be no prejudice of the defendant for the proceeding of the trial. * * *

The petitioner did not present any evidence of his own in defense (R. 35). The judge submitted the case to the jury with an instruction on entrapment (R. 38). In his final instructions, the judge cautioned the jury as follows:[1]

Now, the arguments of counsel and the remarks the Court has made during the course of the trial are not evidence and should not be considered by you as evidence. The evidence that you are to consider in this case is the testimony you have heard from the witness stand and the exhibits which have been admitted into evidence by the Court, and your deliberations should consider no other circumstances whatsoever and should not go

[1] This portion of the instructions was not included in the record filed by petitioner before the Court of Appeals and certified to this Court, but was before the Court of Appeals as an appendix to the appellee's (the Government's) brief, p. 19.

beyond a consideration of the evidence you have actually heard and the exhibits that you will have an opportunity to examine.

SUMMARY OF ARGUMENT

I

The question presented by this case first involves the broad issue of whether a trial judge has any discretion to deny a motion for a mistrial when it is brought to light that some of the jurors have read damaging inadmissible material in newspaper accounts of the trial, even though a careful interrogation leads the judge to conclude positively that the jurors are capable of proceeding in a fair and impartial manner, and of reaching a verdict based only on the courtroom evidence. The record here establishes that the prosecution was not responsible for the information reaching the press. It also establishes that the jury were interrogated carefully, with counsel for both sides participating, and that the trial judge gave a cautionary instruction to the jury in this regard. Under these circumstances, the considered judgment of the District Court is entitled to controlling weight.

A. This Court's last full consideration of the problem of newspaper publicity affecting the impartial consideration of a defendant's case (*Holt* v. *United States*, 218 U.S. 245) affirmed the general principle that the trial judge has discretion in this type of matter. The Court ruled that, even on the assumption that the jurors had actually read misleading newspaper stories, the automatic granting of a motion for a mistrial was not required. No case in the federal Courts of Appeals establishes the proposition for which petitioner argues, *i.e.*, that the mere showing that some jurors have read

damaging inadmissible evidence requires the granting of a motion for a mistrial and precludes an examination of the jurors to aid in ascertaining whether they can remain impartial. On the contrary, the cases are in accord with the majority opinion below.

B. The rulings on prejudice to a defendant, as a result of jurors reading newspaper articles about the trial, separate into two categories—those involving a motion for a new trial made after the jury has returned a verdict, and those involving a motion for a mistrial (such as in the instant case) made before the jury has retired for its deliberations. In the former situation, the rule is often followed that jurors will not be allowed to impeach their own verdict. Because of this rule, and because the courts do not wish to preclude a showing by a losing defendant that his trial was fatally infected, the courts may, on a proper showing of the overt acts from which prejudice may be deduced, assume that prejudice resulted—while excluding testimony of the jurors either for or against that conclusion. In the latter situation, on the other hand, there can be no question of the jurors impeaching their own verdict, and the issue becomes a factual one of how best to ascertain whether the jurors have become prejudiced, and of how much weight as a practical matter should be given to disclaimers of prejudice by the jurors. Compare *United States* v. *Ogden,* 105 Fed. 371 (E.D. Pa.) with *United States* v. *Montgomery,* 42 F. 2d 254 (S.D.N.Y.). Some of the state cases cited by petitioner are distinguishable on this ground, and the others do not support his broad contention.

A motion for a mistrial during trial is more closely related to a challenge for cause made when the jury is being impanelled than it is to a motion for a new

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trial made after verdict. In cases involving a challenge for cause, the rule has always been that the juryman should be listened to before a decision is rendered. Also, where the matter is brought to light during trial, curative steps are possible, such as the cautionary instructions which were given in the present case.

Our jury system assumes that juries can follow instructions. In cases where the court is required to give cautionary instructions limiting the scope of one defendant's confession so as not to allow it to implicate the other defendants, the judicial presumption has been that the jury follows such instructions. What scientific evidence is available tends to support the view that juries are careful to follow instructions admonishing them to disregard harmful material which they have heard in the course of the trial. Neither legal nor scientific precedent discloses a basis for foreclosing exercise of the trial judge's discretion in this type of issue.

II

In this case, there is also the narrower question whether the fact that petitioner claimed a defense of entrapment restricts or removes the trial judge's discretion. This was the basis for the dissenting judge's views in the Court of Appeals. However, as the majority of the Court of Appeals held, such a defense was not properly presented in this case. The undisputed facts, elicited from the government witnesses since petitioner did not present any witnesses of his own, establish only that the offer to buy or receive proscribed medicine came from a government agent. It has been established law since *Sorrells* v. *United States*, 287 U.S. 435, 441, 451, that such a showing,

without more, is not enough to maintain the defense of entrapment.

ARGUMENT

The problem in this case is one which probably can never be wholly eliminated in a country with a free press. A trial which gave every indication of being a minor routine prosecution of no great interest (see R. 29-30) turned out to have news value. Reporters, on their own, without fault of the prosecution, searched out and published facts about petitioner's past which admittedly the government could not properly put into evidence. Apprised of that fact, the trial judge, at the suggestion of defense counsel, carefully questioned each juror, found that only one had really read both articles, and that only three others knew the contents of one article. The judge came to the firm conclusion in his own mind that the jury was capable of judging the case fairly, uninfluenced by the facts appearing in the news articles. There is in this case no issue as to failure to make appropriate inquiry, no issue as to failure to exercise discretion. As the dissenting judge in the court below stated (R. 64):

> * * * The inquiry was as careful and the responses as positive as one could expect, and if we are to take the jurors' conscientious word for their state of mind, we must assume that all extraneous knowledge of the accused's prior and damaging record was completely banished from the jurors' mind and did not influence their consideration of his only defense of entrapment. * * *

The basic question is, therefore, whether there was room for the exercise of the trial judge's discretion or whether he was required to grant a new trial regard-

less of his reasoned conclusion that the jury could judge the case fairly. Petitioner, in this Court, takes the broad position that the mere fact that damaging inadmissible evidence was seen by some of the jurors *ipso facto* required the grant of a new trial—that no action by the trial court can ever cure prejudicial publicity read by some of the jurors. As we show in Point I (*infra*, pp. 13-24), this broad position finds no support in the cases, and is indeed refuted by the decisions of this Court and of the lower federal courts.

The dissenting opinion below (R. 62-65) raises a narrower issue. Its view is that, because there was a defense of entrapment, "no juror could try this accused on the issue of whether he was in fact induced by the government to commit the act for which he was on trial as if they did not know that his past record and moral traits inclined him toward it" (R. 64). The majority below, on the other hand, found that the government's evidence, which petitioner did not dispute, did not even properly present an issue of entrapment so that, in submitting that issue to the jury, the trial judge accorded petitioner more than his due (R. 57). In view of the fact that petitioner had made no attempt to controvert the fact of sale, but had merely tried (incorrectly, as the majority found) to assert a defense of entrapment on the basis of the government's proof, the court found that there was "no area for prejudice to occupy, even if it existed" (R. 60). In our second point (*infra*, pp. 25-28), we discuss our reasons for believing that this ruling is correct.

I

THAT JURORS HAVE SEEN NEWSPAPER ARTICLES CONTAINING INADMISSIBLE INFORMATION DOES NOT IPSO FACTO REQUIRE A MISTRIAL OR A NEW TRIAL: THE MATTER LIES WITHIN THE DISCRETION OF THE TRIAL JUDGE AFTER CAREFUL INQUIRY OF THE TYPE MADE HERE.

A. A Showing That Jurors May Have Seen Prejudicial Publicity Requires the Trial Judge to Exercise a Discretion Which, If Duly Exercised, Is Entitled to Controlling Weight.

Despite the constant interest of newspapers in criminal prosecutions, this Court has not, since its 1910 decision in *Holt* v. *United States*, 218 U.S. 245, found it necessary to consider that issue with respect to the rights of a defendant in a federal prosecution.[2] We think this fact in itself suggests a recognition of what we conceive to be the rule laid down by *Holt* and followed thereafter with respect to issues of publicity—that the matter is one which lies peculiarly within the discretion of the trial judge, and that a careful exercise of that discretion should not be upset by the appellate courts.

In the *Holt* case, counsel for the defendant, in support of a motion for a new trial, filed his own affidavit that members of the jury who had been allowed to separate during the trial had stated to him that they had read newspaper accounts of the articles in the Seattle press. The judge assumed that the jurors had read the articles, but nevertheless denied the motion.[3]

[2] Different considerations are of course involved in attempts to punish a newspaper for contempt by reason of its publishing of articles relating to a trial. See Note, *Controlling Press And Radio Influence On Trials*, 63 Harv. L. Rev. 840, 848-52; Note, *Contempt By Publication*, 59 Yale L.J. 534.

[3] The articles appear at pp. 66-72 of the record in that case, No. 231, Oct. Term, 1910. The defendant complained in particular of an article which appeared on Sunday, December 20, after both sides

On the same assumption, this Court, in an opinion by Mr. Justice Holmes, held that there was no occasion to overrule the discretion of the trial judge, saying (218 U.S. at 251):

> If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under conditions of the present day. Without intimating that the judge did not go further then we should think desirable on general principles, we do not see in the facts before us any conclusive ground for saying that his expressed belief that the trial was fair and that the prisoner has nothing to complain of is wrong.

In other words, even on the basis that the jurors had read the article containing misinformation, this Court held that the decision as to whether to grant a new trial was one calling for the exercise of the trial judge's discretion in view of all the facts, and that the appellate court would not overrule the trial court's judgment in that respect without some conclusive showing that it was wrong. The *Holt* decision is a dispositive refutation of petitioner's fundamental position that the mere fact that the jury has seen prejudicial publicity *ipso facto* requires a new trial.

The ruling in *Holt* had been foreshadowed by previ-

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had rested on Friday, December 18 (R. 70-72), stating *inter alia* that the defendant would take the stand in his own behalf that coming Monday (see brief of plaintiff in error, pp. 108-116). In his opinion denying the motion for a new trial, the trial judge noted that, before the arguments to the jury, the court had cited one of the reporters for contempt and had interrogated him before the jury concerning the article, which the jurors necessarily knew to be inaccurate, eliciting from the reporter an admission that he had been misinformed. The jurors were admonished not to give heed to unreliable statements published by newspapers (R. 10).

ous decisions. The general authority of the trial court to discharge a jury and the correlative right to try the prisoner again was established at least by 1824, when this Court decided *United States* v. *Perez*, 9 Wheat. 579. The opinion of the Court, delivered by Mr. Justice Story, states, at p. 580:

> * * * We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. *They are to exercise a sound discretion on the subject;* and it is impossible to define all the circumstances, which would render it proper to interfere. * * * [Emphasis added]

and later:

> * * * the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. * * *

See also *Wade* v. *Hunter*, 336 U.S. 684, 689-690.

In *Mattox* v. *United States*, 146 U.S. 140, the Court reversed the refusal of the trial judge to grant a new trial without consideration of tendered affidavits of the jurors that a newspaper article had been read to them after they had been unable to agree upon a verdict, and that thereafter they returned a verdict of guilty of murder. The article mentioned that the defendant had been tried for his life once before. The Court held that the trial court erred in refusing to consider the affidavits, not as impeaching the verdict, but as

establishing the overt fact that the jury had read the newspaper article, and said (146 U.S. at 151):

> * * * We should, therefore, be compelled to reverse the judgment because the affidavits were not received and considered by the court; but another ground exists upon which we must not only do this, but direct a new trial to be granted. * * *

The Court was thus ruling, on this aspect of the case, that proof that the jury had seen unfavorable publicity required the trial judge to consider the matter and to exercise his discretion, but that very holding negates the position (which petitioner takes) that such proof in and of itself requires a new trial.

This has been the rule applied by the lower federal courts ever since the *Holt* and *Mattox* decisions. It has been held both that the mere fact that articles dealing with a trial have been published does not compel a new trial, and also that the trial court is not even required to act without some showing that the jurors have seen the allegedly prejudicial publicity.[1] But even on a showing that some jurors have seen newspaper articles containing inadmissible materials, no federal court has held that a new trial must automatically result. Such a showing does require the trial judge to make inquiry (unless the defendant deliber-

[1] *United States* v. *Giovato*, 114 F. Supp. 204 (W.D. Mo.), affirmed, 212 F. 2d 8 (C.A. 8), certiorari denied, 348 U.S. 884; *Hart* v. *United States*, 112 F. 2d 128 (C.A. 5), certiorari denied, 311 U.S. 684; *United States* v. *Keegan*, 141 F. 2d 248 (C.A. 2), reversed on other grounds, 325 U.S. 478; *Welch* v. *United States* 135 F. 2d 465 (C.A. D.C.), certiorari denied, 319 U.S. 769; *United States* v. *Frank*, 151 F. Supp. 866 (W.D. Pa.), affirmed, 245 F. 2d 284 (C.A. 3), certiorari denied, 355 U.S. 819; *Shushan* v. *United States*, 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574.

ately waives such right).[5] Failure to make sufficient inquiry[6] or error in the conduct of the inquiry[7] may constitute reversible error. And where it is shown on inquiry that the prejudicial publicity is the result of misconduct by some governmental officer, court, prosecuting attorney, or other government agent, the courts have generally considered that factor sufficient to weigh the balance against the prosecution, in favor of a new trial.[8] And even where the government is not at fault, a trial judge on examination may come to the

[5] For cases which turn largely on waiver, see *Ferrari* v. *United States*, 244 F. 2d 132 (C.A. 9), certiorari denied, *sub nom. Chrispakos* v. *United States*, 355 U.S. 873; *United States* v. *Marrin*, 159 Fed. 767 (E.D. Pa.), modified, 167 Fed. 951, certiorari denied, 223 U.S. 719; *Cohen* v. *United States*, 27 F. 2d 713 (C.A. 2).

[6] *Mattox* v. *United States*, 146 U.S. 140, discussed, *supra*, pp. 15-16.

[7] *E.g.*, *Marson* v. *United States*, 203 F. 2d 904 (C.A. 6); *Krogmann* v. *United States*, 225 F. 2d 220 (C.A. 6).

[8] *Briggs* v. *United States*, 221 F. 2d 636 (C.A. 6) (trial judge issued bench warrant during trial charging perjury to witnesses who testified contrary to statements they had made to the F.B.I. and this information was publicized; held that, since a trial judge is under a great obligation when commenting on the evidence, there should be a rebuttable presumption of prejudice); *Harrison* v. *United States*, 200 Fed. 662 (C.A. 6) (Post Office issued a "fraud" order against the defendant during the trial, which was prominently published and presumably came to the jury's attention); *Griffin* v. *United States*, 295 Fed. 437 (C.A. 3) (papers quoted district attorney as saying men had confessed and ordered to turn state's evidence); *Hensler* v. *United States*, 246 F. 2d 190 (C.A. 5) (United States attorney filed a motion in a civil case, while criminal case was going on, that was prejudicial to the defendant). But cf. *Reining* v. *United States*, 167 F. 2d 362, 365 (C.A. 5), certiorari denied, 335 U.S. 830 (article, besides being report of trial, stated that one of the prosecuting attorneys had declared that one of the defendants had died and that he had said he would take his own life rather than face prosecution; the court held that the trial judge took precautions and his discretion did not appear to have been abused).

conclusion that the potentialities of prejudice are so great that a new trial is warranted.[9]

But we have found no federal decision where an appellate court has overruled the conclusion of the trial judge, after careful inquiry, that a jury was able to try the case fairly despite adverse publicity not attributable to government officials. To the contrary, the decisions are in accord with the ruling below that where, as here, the adverse publicity did not result from action by government agents, and where the court after inquiry satisfied itself that the jury could try the case fairly, the judgment of the trial court denying a motion for a new trial is entitled to controlling weight. *Holt* v. *United States*, 218 U.S. 245, discussed, *supra*, pp. 13-14; *Rowley* v. *United States*, 185 F. 2d 523 (C.A. 8) (some of the jurors had read an article which stated that the defendant was an ex-convict; the District Court denied a motion for a mistrial and the Court of Appeals, in a brief opinion, affirmed); *United States* v. *Postma*, 242 F. 2d 488, 495 (C.A. 2), certiorari denied, 354 U.S. 922 (articles said that potential witness for the government had stabbed himself after receiving threats; all but two of the panel had read at least one article about the case; all said that they would not be influenced thereby); *United States* v. *Allied Stevedoring Corporation*, 241 F. 2d 925, 934-935 (C.A. 2), certiorari denied, 353 U.S. 984 (press release stated that a previous president of the local

[9] *E.g.*, *United States* v. *Montgomery*, 42 F. 2d 254 (S.D. N.Y.), where a newspaper article, with headline "Swindler Vause Once Hired Chief Witness Against Him," carried defendant's picture with description of him as swindler, jailbird, disbarred lawyer, ex-convict, fugitive from justice, etc. Since several of the jurors had read the articles, and at least one was not able to satisfy Judge Woolsey as to his impartiality, the motion for mistrial was granted.

union also had been indicted for tax evasion); *Christensen et al.* v. *United States*, 16 F. 2d 29, 30 (C.A. 9) (news story on attempt to bribe a juror). See also *Bullock, et al.* v. *United States*, C.A. 6, decided February 27, 1959, slip op., pp. 16-19; *Reining* v. *United States*, 167 F. 2d 362, 365 (C.A. 5), certiorari denied, 335 U.S. 830, discussed *supra*, footnote 8; *United States* v. *Pisano*, 193 F. 2d 355, 361 (C.A 7); *United States* v. *Carruthers*, 152 F. 2d 512, 519 (C.A. 7), certiorari denied, 327 U.S. 787, rehearing denied, 327 U.S. 817, 819; *Dillon* v. *United States*, 218 F. 2d 97, 103 (C.A. 8), certiorari dismissed, 350 U.S. 906; *Stunz* v. *United States*, 27 F. 2d 575, 577-578 (C.A. 8); *Van Riper* v. *United States*, 13 F. 2d 961, 967 (C.A. 2), certiorari denied, *sub nom. Ackerson* v. *United States*, 273 U.S. 702; *United States* v. *Hirsch et al.*, 74 F. 2d 215 (C.A. 2), certiorari denied, 295 U.S. 739; *Bratcher* v. *United States*, 149 F. 2d 742 (C.A. 4), certiorari denied, 325 U.S. 885. See, generally, 86 A.L.R. 928; 31 A.L.R. 2d 417; Note, *Criminal Law: May Jurors Read Newspapers?*, 5 U. Fla. L. Rev. 432; Note, *Controlling Press And Radio Influence On Trials*, 63 Harv. L. Rev. 840, 842, 843, 846-848.[10]

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[10] In the potentially more dangerous situation involving personal contact with a juror for the purpose of bribing or influencing him, this Court has recently held that, while the presumption is that prejudice ensued, the trial judge must still conduct a hearing and exercise his discretion. *Remmer* v. *United States*, 347 U.S. 227, 229-230. In that case one of the jurors reported to the judge that he had been contacted by a third person attempting to bribe him on defendant's behalf. The judge, together with the prosecutor and the F.B.I., investigated without notifying the defendant. This Court remanded to the trial court for a hearing to be conducted on the possibility of prejudice, with the government to carry the burden of showing affirmatively that there was no prejudice. On appeal from the trial judge's determination, the Court again reversed and ordered a new trial on the ground that the earlier mandate had been construed too narrowly by the trial judge. *Remmer* v. *United States*, 350 U.S. 377.

B. Where, as Here, the Fact of Prejudicial Publicity Comes to Light During the Trial, So That the Judge Has the Opportunity to Question the Jurors Closely and Give Cautionary Instructions, There Is No Reason to Assume Prejudice.

In cases where there is a motion for a new trial *after verdict,* based on allegations that the jury had seen or utilized prejudicial material during their deliberations, the line between the rule permitting proof of the fact of improper outside influence and the rule against allowing a juror to impeach his own verdict (see *Mattox* v. *United States,* 146 U.S. 140, discussed *supra,* pp. 15-17) is not an easy one to maintain. It is even more difficult to make this distinction where the fact that jurors had seen improper materials comes to light during the course of the jury's deliberations. For this reason, where the motion is made after verdict, the courts tend more readily to assume prejudice on a mere showing that jurors have read or heard prejudicial matter, since there is a reluctance to inquire into matters which may lead to impeaching the verdict. Where, however, the fact of adverse publicity is brought to light during the course of the trial, there is no problem of impeaching a verdict—so that the jurors can be closely interrogated and, in addition, the judge can give cautionary instructions to the jury to disregard evidence not of record. There is therefore less reason to assume prejudice during the trial than there is after the trial.

This distinction may be illustrated by comparing *United States* v. *Ogden,* 105 Fed. 371 (E.D. Pa.) with *United States* v. *Montgomery,* 42 F. 2d 254 (S.D.N.Y.). In *Ogden,* the trial judge granted a motion for a new trial made after a verdict had been returned, and refused to allow examination of the jurors on the issue of prejudice, since this would be allowing the jurors

to impeach their own verdict. In *Montgomery*, although the newspaper articles read by the jurors were a veritable catalogue of every conceivable prejudicial statement, the trial judge did not grant the motion for mistrial, made before the jury had retired, on a mere showing that the jurors had in fact read the articles. He proceeded to examine them as to their ability to consider the case impartially, though resolved to grant the motion if any doubt remained in his mind that any juror could not remain unaffected. Only when this proved to be the result was a mistrial awarded.

Some of the state cases cited by petitioner (Pet. Br. 10) rest on this distinction. This is particularly true of *People* v. *Wong Loung*, 159 Cal. 520, where the affidavits in support of the movant's contention were rejected, but the court assumed prejudice, after verdict, from the bare circumstance that at least one juror had read the article. See the distinction drawn by the California Code between inquiry before trial, West's Ann. Cal. Codes, Vol. 49 (Penal Code), Section 1081, and reception of the juror's affidavit after verdict, West's Ann. Cal. Codes, Vol. 16 (Code of Civil Procedure), Section 657(2). To the same effect is *Sprinkle* v. *State*, 137 Miss. 731, where it was shown, in support of a motion for new trial, that prior to reading the article in the jury room the vote was eleven to one for conviction, and thereafter it was unanimous.[11]

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[11] In *Commonwealth* v. *Landis*, 12 Phila. Reports 576, a lower court opinion granting a motion for new trial, it was noted that the American practice is more liberal than the English, in that more leeway is permitted after a verdict is recorded to attack the verdict on such grounds. In *Babb* v. *State*, 18 Ariz. 505, and *Golden* v. *State*, 89 Tex. Cr. 525, cited by petitioner, there were other

A motion for a mistrial on grounds of improper publicity, made during the trial when the judge may examine and admonish the jurors, bears closer resemblance to challenging the jurors for cause when they are being impanelled than it does to a motion for a new trial made after the verdict. Where a challenge for cause based on prejudice from antecedent knowledge is made, it has long been the rule that:

> * * * light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him. Those who try the impartiality of a juror ought to test him by this rule. *They ought to hear the statement made by himself* or given by others, and conscientiously determine, according to their best judgment, whether in general men under such circumstances ought to be considered as capable of hearing fairly, and of deciding impartially, on the testimony which may be offered to them, or as possessing minds in a situation to struggle against the conviction which that testimony might be calculated to produce. * * *

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grounds for reversal and the decisions contain no detailed discussion of the procedure to be followed.

People v. *Hryciuk*, 5 Ill. 2d 176, affirms the awarding of a new trial by the lower court pursuant to the post-conviction remedies in Illinois. The original conviction was obtained in 1939. Besides being in essence an affirmance of the exercise of the lower court's discretion, the court states that the prosecution was responsible for the information's reaching the press. The opinion speaks in terms, not of requiring a new trial in every such instance, but of not denying a new trial in every such instance.

[emphasis added; *United States* v. *Burr*, 25 Fed. Cas., No. 14,692g, at 51].

See also *Reynolds* v. *United States*, 98 U.S. 145, 155-156. In *Holt* v. *United States*, 218 U.S. 245, 248, the Court, in addition to its ruling on the motion for a new trial (discussed *supra*, pp. 13-14), held that there was no error in failing to exclude for cause a juryman who said he had read the papers concerning the case but that evidence could change his opinion very easily. Both with respect to challenges for cause at the outset and to adverse publicity during the trial, the trial judge must weigh disclaimers of prejudice against his own objective conclusions about the fatal quality of the infection of outside knowledge.

It has never been the rule in criminal cases that the mere fact that a jury has seen or heard inadmissible evidence necessarily and *per se* requires a new trial. In *Holt* v. *United States*, 218 U.S. 245, 249, the jury was present when the court took testimony on the admissibility of a confession which was ultimately excluded as improperly obtained. This Court held that, in view of the strong cautionary instructions that the preliminary hearing had no bearing on the question the jury had to decide, the course followed by the trial judge could not be deemed reversible error. Our system of jury trials is based on the assumption that juries can and will follow instructions of the trial judge, even with respect to so difficult a matter as considering only against one defendant a confession implicating another. *Delli Paoli* v. *United States*, 352 U.S. 232, 241-243; *Opper* v. *United States*, 348 U.S. 84, 95. There is less difficulty in requiring a jury, by proper instructions, to disregard newspaper publicity

which does not have the dignity of evidence offered in court. The public has a fund of scepticism regarding isolated news articles, as the remarks of some of the jurors on interrogation in this case indicate (see *supra*, pp. 5-6). Such experimentation as has been conducted, while inconclusive, tends to confirm the view that jurors are capable, in general, of disregarding harmful material under appropriate guidance from a trial judge. See Weld & Danzig, *A Study of the Way in Which a Verdict is Reached by a Jury*, 53 Am. J. Psych. 518, 526 (fn. 4).

In short, precedent, both legal and scientific, does not demand a positive conclusion that prejudice is likely. The matter is one peculiarly a subject for the informed discretion of the trial judge. As was said in a different connection, a great amount of discretion is entrusted to the trial judge in the federal judiciary, on the supposition that a high degree of competence may be assumed, since a lack of that supposed competence can never be compensated for by appellate review, no matter how stringent. *Michelson* v. *United States*, 335 U.S. 469, 487-488.

When, as in this case, the trial judge conducted a careful inquiry (*supra*, pp. 4-6) and reached the firm conclusion on the basis of his personal interrogation that the jury was able to try the case fairly (*supra*, pp. 6-7), and where he cautioned the jury to decide the case only on the evidence before them (*supra*, pp. 5-8), there is no reason to overturn his considered judgment.

II

THE FACT THAT PETITIONER, WITHOUT BASIS IN THE EVIDENCE, CLAIMED A DEFENSE OF ENTRAPMENT DOES NOT RENDER THE PUBLICITY SO PREJUDICIAL THAT ACTION BY THE TRIAL JUDGE COULD NOT CURE IT.

As noted at the outset (*supra*, p. 12), the dissenting judge below felt that, in view of the defense of entrapment in this case, the newspaper accounts seen by the jurors were so prejudicial that a new trial was required as a matter of law, regardless of the careful inquiry by the trial judge and regardless of the honest belief by the jurors that they could try the case fairly. The majority below were of the view that there was in this case no evidence tending to support a defense of entrapment, and therefore no area in which this claim of special prejudice could be said to operate. In the light of these specific rulings below, we deem it appropriate to discuss the defense of entrapment in relation to the issue of publicity on which the Court granted certiorari (*supra*, p. 2), even though the Court did not grant review on the direct issue with respect to entrapment raised by petitioner (Pet. 2, second question presented).

We submit that the court below was correct in ruling that the defense of entrapment was not properly in this case. The facts as recited in the Statement (*supra*, pp. 2-3) need not be repeated. The defense called no witnesses, and the only testimony about the alleged transactions was given by a government witness, Robert E. Keating, an inspector for the United States Food and Drug Administration. He stated that he was introduced to petitioner by a third party, as a friend, on April 18, 1956. He identified himself as a salesman. At their second meeting, on April 23, 1956, he asked petitioner for "stay-awake" pills because he was

about to undertake a long journey by car. After petitioner suggested No-Doz and coffee and was told that that had been tried to no avail, the subject was dropped and the conversation turned to other matters. Then, as the inspector was about to leave, petitioner called him back into the apartment and gave him some tablets and pills, with instructions for use. On May 1, 1956, the inspector met petitioner for the third time and asked for more of the pills, at which time he was sold a quantity for $15. It is significant that, the first time petitioner was asked for pills, he had some in his possession. It is also significant that on the later occasion, when petitioner said he did not have the needed quantity on hand, the inspector asked if he would have to purchase them at a drug store, and if he could go along to save an extra trip. Petitioner, although saying that he would probably have to purchase them at a drug store, declined to let the inspector come along. This indicates that petitioner had a source of supply, either through illegally obtaining them from legitimate sources, or from purely illegitimate sources.

On this evidence, the claim of entrapment reduces itself to the proposition that the mere fact that the offer to buy proscribed medicine came from a government agent, in and of itself, raises an issue of entrapment. Such, however, is not the law. As this Court said in *Sorrells* v. *United States,* 287 U.S. 435, 451, "the defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises." The Court had previously pointed out in that case (287 U.S. at 441):

> It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. * * *

To raise an issue of entrapment, there must be some showing, either from the government's own proof (as in *Sherman* v. *United States*, 356 U.S. 369) or by the proof offered by the defendant, that "the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials." *Sherman* v. *United States*, *supra*, at 372. There was no such showing here from the government's evidence, and petitioner made no attempt to make a showing on his own behalf. There was no proof of unusual circumstances, of playing on petitioner's sympathy, of pressure applied to the weakness of an unwilling suspect, or trickery to lure an unfortunate innocent into the commission of a crime. The inspector did no more than afford petitioner an opportunity to commit the offense. In submitting the issue of entrapment to the jury, the judge accorded petitioner more than was his due, since petitioner had no right to have the jury consider this issue on the evidence presented. Cf. *United States* v. *Pisano*, 193 F. 2d 355, 361 (C.A. 7). Petitioner cannot, therefore, contend that he was prejudiced in the minds of the jury when it considered his affirmative defense of entrapment after having seen the newspaper articles. The majority below correctly held that there was not, on the facts of this case, any special circumstances arising out of the defense of entrapment, which would make it impossible for the jury, adequately interro-

gated and adequately cautioned, to decide the case fairly on the evidence presented in court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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